Nos. 14-1418, 14-1453, 14-1505,
15-35, 15-105, 15-119 & 15-191

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In the
Supreme Court of the United States

DAVID A. ZUBIK, ET AL.,
Petitioners,

v.

SYLVIA MATHEWS BURWELL, ET AL.,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for the
Third, Fifth, Tenth and District of Columbia Circuits

BRIEF OF THE AMERICAN HUMANIST ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS AND AFFIRMANCE

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INTERESTS OF *AMICUS CURIAE*

This Amicus brief is being filed on behalf of the American Humanist Association (AHA), an educational nonprofit whose commitment is to the philosophy of humanism.[1] The specific aspect of humanism that is relevant here is its commitment to the separation of church and state and the reproductive rights of individuals. Humanists believe that the Enlightenment and the common law provide the foundation for our nation's laws[2] and serve as the basis for many humanist ethics and values. Secular laws enacted by the collective conscience, "we the people," in service of the general welfare provide the basis for our constitution, not the divine authority of popes, kings, or scripture written or inspired by God. Humanist ethics, like our common law, are based on the assumption that our moral integrity is a natural outgrowth of our collective experience and knowledge from observing the social impact of human interaction. It requires reason, emotional intelligence, dialogue, and an acknowledgement of error when experience demonstrates our mistaken judgment, unlike claims of infallibility.

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[1] All parties have consented to the filing of this amicus curiae brief pursuant to Rules 37.3 and 37.6 of the Rules of the Supreme Court. No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made any monetary contribution toward the brief's preparation or submission.

[2] With the exception of the U.S. Supreme Court case of *Bradwell v. Illinois*, 83 U.S. 130 (1873), in which Justice Joseph Bradley, writing in concurrence, stated "Man is, or should be, woman's protector and defender This is the law of the Creator." *Id.* at 141.

Our commitment to a more perfect, caring nation is shaped by our character, based on healthy parenting and life experience, rather than holy supernatural sources. The following words of Mario Cuomo in his address, "Religious Belief and Public Morality," captures the Humanist aspiration about the relationship of religious belief and the general welfare:

> I may use the prescribed processes of government – to convince my fellow citizens, Jews, Protestants, Buddhists, and nonbelievers, that what I propose is as beneficial for them as I believe it is for me. But it's not just parochial or narrowly sectarian but fulfills a human desire for order, for peace, for justice, for kindness, for love, for any of the values that most of us agree are desirable even apart from their specific religious base or context.[3]

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[3] Governor Mario Cuomo, Religious Belief and Public Morality: A Catholic Governor's Perspective, Address Delivered as a John A. O'Brien Lecture in the University of Notre Dame's Department of Theology (Sept. 13, 1984).

SUMMARY OF ARGUMENT

This Court is aware that most amicus briefs in this case repeat many of each other's argument, the argument of the lower court judges, and the respective advocates. This repeated argument is whether the burden of signing a waiver by the claimants as an excuse from providing contraceptives under the Affordable Care Act ("ACA") is a de minimis intrusion of their religious exercise. With respect for the time value of the judges of this Court, the advocate of this amicus brief sets forth several unique arguments that brings a fresh perspective to the issues before this Court and to its consideration of future Religious Freedom Restoration Act ("RFRA") cases. These arguments, more fully developed in the brief, follow:

1. The Court need not decide whether the filing of an exemption form imposes a de minimis imposition on the plaintiffs' exercise of religion. RFRA requires that the government *may* burden an exercise of religion if the burden would prevent "furthering" that interest. Therefore, in this case, should the claimants prevail, they would prevent *any* of the ACA insured beneficiaries from access to contraceptives although contraceptive benefits were determined to be a compelling government interest.[4] That is, if the claimants

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[4] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. 8,725, 8,728 (Feb. 15, 2012), wherein Congress held hearings that determined that providing contraceptives as part of a comprehensive health care plan served a compelling

are excused from signing a waiver for religious reasons, then there would be no way of determining employers that have religious objections from those that don't.

Thus, the only way of insuring that the claimants' religious freedom was honored (by exempting them from signing a waiver) would be to deny contraceptives to *all* ACA insureds. This would enable the claimants to impose their religious beliefs on people who don't share their religious beliefs and others whose religious freedom would be infringed.

It is possible for this Court to rule that there are *no* "means" of accommodating the claimants' religion that are less restrictive than the signing of a waiver that will enable the government to fulfill its compelling interest. Thus, "the least restrictive means of furthering that compelling government interest" may impose **some** burden on religion that would enable the government interest to be achieved.

2. Permitting the plaintiffs to be excused from laws that promote public health as a compelling government interest would provide a license to plaintiffs to impose theocracy, Sharia or biblical law, upon our legal system. This would undermine democracy in violation of the preamble of our Constitution that imposes a duty to serve the general welfare. RFRA was not passed to serve the general

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government interest. For more details of the findings of those hearings, *see infra* Section II of this brief.

welfare, it was largely an effort by conservative Christians seeking to avoid renting to unmarried couples, single mothers, or gay couples on the basis of religious freedom.[5]

3. There is no objective way of determining whether signing this form is a material imposition on faith. Some judges may believe that even de minimis impositions are impermissible. This will depend on a subjective opinion. However, this subjective judgment can be avoided by ruling that (1) a compelling government interest is served by providing contraceptives and (2) there are some religious behaviors (signing a waiver) that can't be accommodated by laws "furthering a compelling government interest."

4. There are compelling government interests that can't be compromised for certain sincerely held religious beliefs because they would undermine the general welfare. *See*

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[5] Marci A. Hamilton, *The Road to and From Extreme Religious Liberty*, THE HUMANIST: A MAGAZINE OF CRITICAL INQUIRY AND SOCIAL CONCERN, Nov/Dec 2015, at 28, 30; Marci A. Hamilton, *The Case for Evidence-Based Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, 9 HARV. L. & POL'Y REV. 147 (Feb. 23, 2015). *See, e.g.*, *Intermountain Fair Hous. Council v. Boise Rescue Mission Ministries*, 655 F. Supp. 2d 1150 (D. Idaho 2009); *Ungar v. N.Y. City Hous. Auth.*, 2009 U.S. Dist. LEXIS 3578 (S.D.N.Y Jan. 14, 2009); *Open Homes Fellowship, Inc. v. Orange Cnty*, 325 F. Supp. 2d 1349 (M.D. Fla. 2004); *Smith v. Fair Emp't & Hous. Comm'n*, 913 P.2d 909 (Cal. 1996); *Donahue v. Fair Emp. & Hous. Comm'n*, 2 Cal. Rptr. 2d 32 (Cal. Ct. App. 1992); *State v. French*, 460 N.W.2d 2 (Minn. 1990).

Burwell v. Hobby Lobby Stores, 134 S. Ct. 2751, 2784 (2014) wherein the majority opinion (in obiter dictum) recognized that there were certain religious free exercise claims for which there could be "no less restrictive" alternative available. This was a concession to the dissent that recognized a host of claims (similar to the ones mentioned herein) that could be made by litigants seeking a religious exemption. *Id.* These exemption claims may include: 1. tax avoidance, 2. race, sex, and LGBT discrimination, and, 3. child abuse. This amici argues that the criteria for distinguishing unacceptable religious freedom exemptions is to read the Constitution preamble as establishing the purpose of the Constitution which governs the body of the Constitution (and the religious freedom clause). We fought the Civil War to "insure domestic tranquility." The Constitution created a nation in order to be credit worthy which could not be accomplished by a confederation of states. Therefore, national taxation power was essential for the general welfare. This amici argues that matters of public health and security similarly fall into the category of protection of the "general welfare."

5. The First Amendment's religious freedom clause was based on the intellectual history of the 17th and 18th centuries, discussed *infra,* in Section V of this brief. This information is valuable in order to apply the original meaning of the "free exercise" clause.

6. The moral position of humanism is equivalent to the freedom of religion claim of the plaintiffs in this suit and is in opposition to their religious freedom claims about contraception.

ARGUMENT

I. A Ruling Requiring the Claimants to Sign a Form to Assert Their Religious Exemption from Disseminating Contraceptives is Compatible with RFRA.

The purpose of RFRA, according to the Congressional findings and Declaration of Purpose under the act, was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C.S. § 2000bb.

> [I]n *Employment Division v. Smith*, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing governmental interests.

42 U.S.C.S. § 2000bb.

RFRA provides that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.*

Therefore, the act only restricts government action when a person's exercise of religion is "substantially burdened." If the exercise of religion isn't substantially burdened, then RFRA doesn't apply Consequently, most of the other briefs have argued that the signing of the waiver form is not a "substantial" burden.

This brief alternatively argues that once it has been determined that access to contraceptives serves a compelling government interest, the "least restrictive means" for accommodating the claimants may prohibit "furthering that compelling government interest." If the Court ruled in favor of the claimants, there would be no way of identifying those who have a religious objection or determining whether their objections were sincere. Thus, the only way of honoring the claimant's religious conscience would be to deny all insureds access to contraceptives. This would enable the claimants to use their religious expression to trump the conscience and religious beliefs of those who disagree with their faith based beliefs.

In *Sherbert* the accommodation of the claimant for unemployment benefits by honoring her religious beliefs would not have undermined the unemployment benefit laws. 374 U.S. 398. In *Yoder* the exemption of Amish children from mandatory schooling after the eighth grade did not undermine the mandatory school laws for other children. 406 U.S. 205. However, if the religious accommodation in either of these cases would have thwarted the compelling government interest, then the outcome would have been different. Here, however, the claimant's assertion would undermine the

compelling government interest in providing contraceptives under the ACA.

In *Employment Division*, the Court determined that the state could deny unemployment benefits to a person fired for violating a state prohibition against using peyote, even though the use of the drug was part of a religious ritual. If *Employment Division* had been decided after RFRA was passed and the drug used was a poisonous drug, it remains a question for the court to decide whether religious freedom extends to religious suicide as part of a cult ritual.[6]

This gives rise to the argument that there are some laws that serve a compelling government interest that are essential for serving the public health, safety, security, or general welfare for which there may be no "least restrictive means" to accommodate exercise of religious freedom.

It is a well-established First Amendment free exercise jurisprudence that the courts may not decide issues of religious doctrine.[7] *Cent. Coast*

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[6] Consider a Kentucky church's insistence on using venomous snakes in Sunday sermons at the Full Gospel Tabernacle in Jesus Name church. The basis for the practice is a literal reading of a passage in the Gospel of Mark that reads, in part: "They shall take up serpents; and if they drink any deadly thing, it shall not hurt them; they shall lay hands on the sick, and they shall recover." *Mark* 16:18. All nonnative species, including vipers, are prohibited by law and only zoos, government agencies or colleges and universities are not subject to these regulations.

[7] In *United States v. Ballard*, 322 U.S. 78 (1944) the Court held that it should not decide whether the claim of the "I Am" members were actually true, only whether the members honestly believed them to be true.

Baptist Ass'n, v. First Baptist Church of Las Lomas, 65 Cal. Rptr. 3d 100 (Cal. Ct. App. 2007). It is equally axiomatic that the freedom to believe is absolute while the freedom to act on those beliefs is not. *Reynolds v. United States*, 98 U.S. 145 (1878).

Whereas RFRA requires that a compelling government interest be applied in the least restrictive means, it nevertheless authorizes the government to demonstrate that the burden imposed by religious behavior can't be accommodated in a "least restrictive way" satisfactory to the claimants that will preserve the government interest. The courts will be left to decide whether there may be compelling government interests for which there is no "least restrictive way" that the religious practice can be accommodated if the practice poses a threat to the health, safety, welfare, or security of the public. For example, in 1983, the Court decided in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), that a nonprofit private school that discriminated against students or prospective students on the basis of race could not claim tax exempt status as a charitable organization for purposes of federal laws. In *Reynolds*, a case that involved polygamous marriage practices, the Court set a precedent that, while guaranteeing the free exercise of religious beliefs, permits the state to limit religious practices. These cases were decided under the principles of law that Congress intended to restore in RFRA before *Smith*, 494 U.S. 872. Therefore, when the state can demonstrate a compelling interest in the promotion of health, life, safety, or welfare, religious practices may be curtailed in order to fulfill the purpose of the government act.

Are religions exempt by RFRA from criminal law prohibiting the killing of people that commit adultery,[8] prohibiting parents from beating their children,[9] killing them for cursing their parents,[10] or stoning people for cursing,[11] owning slaves,[12] or

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[8] *Leviticus* 20:10. For example, *Leviticus* 20:14, prohibits any sexual contact between a man and his mother-in-law and death by fire is to be administered to all violators.

[9] *Proverbs* 23:13-14 ("Withhold not correction from the child: for *if* thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell."). According to American Episcopalian Bishop John Shelby Spong, the Jesus story as portraying "the holy God involved in a cruel act of divine child abuse that was said to have occurred on a hill called Calvary." JOHN SHELBY SPONG, THE SINS OF SCRIPTURE: EXPOSING THE BIBLE'S TEXTS OF HATE TO REVEAL THE GOD OF LOVE 171-73 (2005). "God's righteousness was restored when the son of God was punished as a substitute for us." *Id.* at 171. Child abuse "validates our own violence, since when we abuse others we are only acting after the example that God has set for us. The punishing God is thus replicated in the punishing parent, the punishing authority figure and the punishing nation. Violence is redemptive. War is justified. Bloodshed is the way of salvation." *Id.* at 172-73.

[10] *Leviticus* 20:9 ("For every one that curseth his father or his mother shall be surely put to death[.]").

[11] *Leviticus* 24:14 ("Bring forth him that hath cursed without the camp; and let all that heard *him* lay their hands upon his head, and let all the congregation stone him.").

[12] The Bible depicts slavery as an institution sanctioned by God and deserving of support. *See Colossians* 3:22, 1 *Peter* 2:18, *Ephesians* 6:5-7. For example, *Titus* 2:9-10 says "Bid slaves to be submissive to their masters and to give satisfaction in every respect; they are not to be refractory, nor to pilfer, but to show entire and true fidelity, so that in everything they may adorn the doctrine of God."

stoning a man to death for gathering sticks on the Sabbath,[13] as all are sanctioned by biblical scripture?

Furthermore, state laws requiring the vaccination of all children before they are allowed to attend school in spite of religious beliefs opposing vaccination were constitutional because the laws are designed to prevent the spread of contagious diseases.[14] Public health protection has been deemed to outweigh any competing interest in the exercise of religious belief that oppose immunization as applied to children. RFRA was intended only to restore the compelling interest test as set forth in *Sherbert*, 374 U.S. 398. 42 U.S.C.S. § 2000bb.

A number of cases have involved the issue of whether there is a compelling state interest to require that a blood transfusion for a life-threatening condition or disease be given to a child whose parent's religion prohibits such treatment.[15]

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[13] *Numbers* 15:32-35 ("While the children of Israel were in the wilderness, they found a man that gathered sticks upon the Sabbath day And the Lord said to Moses, The man shall be surely put to death, all the congregation shall stone him with stones outside the camp.").

[14] *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *McCarthy v. Boozman*, 212 F. Supp. 2d 945, 948-49 (W.D. Ark. 2002); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987); *Davis v. State*, 294 Md. 370, 379 n.8 (Md. 1982); *Cude v. State*, 237 Ark. 927 (Ark. 1964); *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979). *See also Workman v. Mingo Cnty. Bd. of Educ.*, 419 Fed. Appx. 348 (4th Cir. W Va. 2011)(This case was not selected for publication in the Federal Reporter. *See* Fed. R. App. Pro. 32.1.).

[15] Thirty-eight states had laws that shield parents from prosecution if they reject medical treatment for their children in favor of faith healing. However, most of these state laws specify that if a child's condition is life-threatening, then a

The courts have required the transfusions in cases of minors or the mentally incompetent in spite of parental or guardian objections on religious grounds in recognition of the compelling government interest to protect the health and safety of the public.

The Book of Mormon promotes racism[16] and anti-Semitism[17] as does the New Testament.[18] "The New

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physician must be consulted. Dean Schabner, *When Divine Intervention Breaks the Law*, ABCNEWS.COM (Oct. 3, 2002), http://abcnews.go.com/US/story?id=91171&page=1 (last visited Jan. 25, 2016).

[16] The Book of Mormon, *Alma* 3:6 ("And the skins of the Lamanites were dark, according to the mark which was set upon their fathers, which was a curse upon them because of their transgression and their rebellion against their brethren, who consisted of Nephi, Jacob, and Joseph, and Sam, who were just and holy men."); The Book of Mormon, 2 *Nephi* 5:21-23 ("And he had caused the cursing to come upon them, yea, even a sore cursing, because of their iniquity. For behold, they had hardened their hearts against him, that they had become like unto a flint; wherefore, as they were white, and exceedingly fair and delightsome, that they might not be enticing unto my people the Lord God did cause a skin of blackness to come upon them. And thus saith the Lord God: I will cause that they shall be loathsome unto thy people, save they shall repent of their iniquities. And cursed shall be the seed of him that mixeth with their seed; for they shall be cursed even with the same cursing. And the Lord spake it, and it was done."); The Book of Mormon, 3 *Nephi* 2:15-16 ("And their curse was taken from them, and their skin became white like unto the Nephites; And their young men and their daughters became exceedingly fair, and they were numbered among the Nephites, and were called Nephites. And thus ended the thirteenth year.").

[17] The Book of Mormon, 2 *Nephi* 10:3 ("Wherefore, as I said unto you, it must needs be expedient that Christ—for in the last night the angel spake unto me that this should be his name—should come among the Jews, among those who are the more wicked part of the world; and they shall crucify him—for thus it behooveth our God, and there is none other nation on

Testament is a repository of hostility to Jews and Judaism. Many, if perhaps even most, Christians are completely free of anti-Semitism, yet Christian scripture is permeated by it."[19]

The Qur'an 8:12 [20] and 4:89 [21] state that unbelievers should be killed. Killing oneself in order to kill unbelievers in battle was encouraged by Mohammad as an act of martyrdom called "Fedayeen" or "Shahid" with liberal promises of earthly rewards in heaven including food and sex.[22]

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earth that would crucify their God."); The Book of Mormon, 2 *Nephi* 25:2 ("For I, Nephi, have not taught them many things concerning the manner of the Jews; for their works were works of darkness, and their doings were doings of abominations."); The Book of Mormon, *Jacob* 4:14 ("But behold, the Jews were a stiffnecked people; and they despised the words of plainness, and killed the prophets, and sought for things that they could not understand. Wherefore, because of their blindness, which blindness came by looking beyond the mark, they must needs fall; for God hath taken away his plainness from them, and delivered unto them many things which they cannot understand, because they desired it. And because they desired it God hath done it, that they may stumble.").

[18] JOHN SHELBY SPONG, *supra*, ch. 22.

[19] SAMUEL SANDMEL, ANTI-SEMITISM IN THE NEW TESTAMENT? 166 (1978).

[20] "I am with you, so strengthen those who have believed. I will cast terror into the hearts of those who disbelieved, so strike [them] upon the necks and strike from them every fingertip." Qur'an 8:12.

[21] "They long that ye should disbelieve even as they disbelieve, that ye may be upon a level (with them). So choose not friends from them till they forsake their homes in the way of Allah; if they turn back (to enmity) then take them and kill them wherever ye find them, and choose no friend nor helper from among them " Qur'an 4:89.

[22] Qur'an 4:74, 9:111, 2:207, 62:10-12; *Sahih al-Bukhari* 52:54; *Sahih Muslim* 20:4635. Suicide bombing committed by Muslims

Would our courts exempt conduct of slavery, racism, anti-Semitism, or the killing of unbelievers from criminal liability under RFRA because these acts were done in the name of sincerely held religious belief? What if the religious believers were Al Queda, Church of Euthanasia, Church of Satan, Ku Klux Klan, Luciferians, Muslim Brotherhood, Paganist White Separatists?[23]

Consequently, the courts must decide what laws that serve a compelling government interests for which there are no "least restrictive means" available will "further" the compelling government interest. Alternatively, this court may decide that the "least restrictive means" test may nevertheless not be as restrictive as desired by the RFRA religious claimants here. There is no objective proof of what constitutes "least restrictive means."[24] In any event the "least restrictive means" may be a burden that would defeat the "furthering of the compelling government interest" in violation of RFRA.

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based on an ideology that promotes martyrdom for Allah are regular news items in modern society.

[23] A description of these churches and their beliefs can be found in Hamilton, *The Case for Evidence-Based Exercise Accommodation: Why the Religious Freedom Restoration Act is Bad Public Policy*, *supra* note 4, at 142-44 nn. 74-93.

[24] *See* Hamilton, *The Road to and From Extreme Religious Liberty*, *supra* note 4, at 31, in which the author asserts "RFRA makes the judiciary a superlegislature, with judges second-guessing any legislative or legal rule if it imposes a burden on any believer and any belief." "Least restrictive" is an "opaque" term. *Id.*

II. There is a Compelling Government Interest for Including Contraceptives as a Health Care Benefit Under the ACA

The Department of Health and Human Services hearings established final regulations regarding preventative services under RFRA. Public Health Services Act section 2713 findings were that coverage of recommended preventive services by health insurance issuers without cost sharing is necessary to achieve basic health care coverage for more Americans. The secular justifications for this coverage[25] were found to be that individuals are more likely to use preventive services if they do not have to satisfy cost sharing requirements (such as copayment, coinsurance, or a deductible). "Use of preventive services results in a healthier population and reduces health care costs by helping individuals avoid preventable conditions and receive treatment earlier."[26]

Congress amended the ACA to ensure that recommended preventive services for women are covered adequately by group health insurance coverage in recognition that women have unique health care needs and burdens. "Such needs include contraceptive services."[27] "Studies show a greater

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[25] Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 77 Fed. Reg. at 8,728.

[26] INST. OF MED., CLINICAL PREVENTIVE SERVICES FOR WOMEN: CLOSING THE GAPS 16 (2011).

[27] *Id.* at 9. *See also*, Adam Sonfield, *The Case for Insurance Coverage of Contraceptive Services and Supplies Without Cost-Sharing*, 14 GUTTMACHER POL'Y REV. 10 (2011), *available at* https://www.guttmacher.org/pubs/gpr/14/1/gpr140107.html (last visited Jan. 25, 2016).

risk of preterm birth and low birth weight among unintended pregnancies compared with pregnancies that were planned."[28] "Contraceptives have medical benefits for women that are contraindicated for pregnancy, and there are preventive health benefits from contraceptives relating to conditions other than pregnancy (*e.g.*, treatment of menstrual disorders, and pelvic pain)." [29] Furthermore, contraceptives prevent unwanted pregnancies [30] and unwanted children, and reduce abortion services [31] and the spread of venereal disease. Religions that oppose the use of contraceptives do not provide for the adoption or care of unwanted children that result from unprotected sex.

In addition, there are significant cost savings to employers from coverage of contraceptives. A 2000 study estimated that it would cost employers 15 to

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[28] Jessica D. Gipson, Michael A. Koenig, and Michelle J. Hindin, *The Effects of Unintended Pregnancy on Infant, Child and Parental Health: A Review of the Literature*, 39 STUDIES IN FAMILY PLANNING 18 (Mar. 2008).

[29] INST. OF MED., *supra*, at 107.

[30] According to the Guttmacher Institute, in 2010 publicly funded family planning services prevented 2.2 million unintended pregnancies, which would have otherwise led to 760,000 abortions. Jennifer J.Frost, Mia R. Zolna & Lori Frohwirth, *Contraceptive Needs and Services, 2010*, GUTTMACHER INST. (July 2013), https://www.guttmacher.org/pubs/win/contraceptive-needs-2010.pdf (last visited Jan. 25, 2016).

[31] *Id.* Jennifer J.Frost, Mia R. Zolna & Lori Frohwirth, *Contraceptive Needs and Services, 2013 Update*, GUTTMACHER INST. (July 2015), https://www.guttmacher.org/pubs/win/contraceptive-needs-2013.pdf (last visited Jan. 25, 2016); Rebecca Wind, *U.S. Abortion Rate Hits Lowest Level Since 1973*, GUTTMACHER INST. (Feb. 3, 2014), http://www.guttmacher.org/media/nr/2014/02/03/.

17 percent more not to provide contraceptive coverage.[32] When contraceptive coverage was added to the Federal Employees Health benefits program, premiums did not increase because there was no resulting health care cost increase.[33] A 2010 survey of employers revealed that 85 percent of large employers and 62 percent of small employers offered coverage of FDA approved contraceptive."[34] There is no evidence that employees expressed religious objections to these private plans. Finally, there are cost savings to women who would otherwise be compelled to later abort their unwanted pregnancy and cost savings to society from supporting children whose parents weren't able to support them.

Congress determined that existing preventive services recommendations often did not adequately

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[32] Testimony of the Guttmacher Inst., Submitted to the Comm. on Preventive Servs. for Women, Inst. Of Med. 11 (Jan. 12, 2011 (citing to Rowena Bonoan & Julianna Gonen, *Promoting Healthy Pregnancies: Counseling and Contraception as the First Step*, FAMILY HEALTH IN BRIEF 3 (2000)), http://www.guttmacher.org/pubs/CPSW-testimony.pdf (last visited Jan. 25, 2016); *see also* Sonfield, *supra* note 27, at 10 (2011); Ifigeneia Mavranezouli, *Health Economics of Contraception*, 23 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNECOLOGY 187-198 (2009); James Trussell, *et al.*, *Cost Effectiveness of Contraceptives in the United States*, 79 CONTRACEPTION 5-14 (Aug. 2009); James Trussell, *The Cost of Unintended Pregnancy in the United States*, 75 CONTRACEPTION 168-170 (Mar. 2007).

[33] Cynthia Dailard, *The Cost of Contraceptive Insurance Coverage*, 6 GUTTMACHER REP. ON PUB. POL'Y (Mar. 2003), https://www.guttmacher.org/pubs/tgr/06/1/gr060112.html (last visited Jan. 25, 2016).

[34] Gary Claxton, *et al.*, *Employer Health Benefits: 2010 Annual Survey*, KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST (2010), https://kaiserfamilyfoundation.files.wordpress.com/2013/04/8085.pdf (last visited Jan. 25, 2016).

serve the unique health needs of women. This disparity places women in the workforce at a disadvantage compared to their male coworkers. Researchers have shown that access to contraception improves the social and economic status of women.[35] Contraceptive coverage, by reducing the number of unintended and potentially unhealthy pregnancies, furthers the goal of eliminating this disparity by allowing women to achieve equal status as healthy and productive members of the job force. Research also shows that cost sharing can be a significant barrier to effective contraception.[36]

III. Public Policy Requires that Public Health Not Be Subordinated to Religious Dogma.

Among women who are currently at risk of unintended pregnancy, 87 percent of Catholics use contraception: 68 percent of them employ sterilization, the IUD, the pill: four percent using other methods, such as withdrawal.[37] Catholics for Choice stated in 1998 that 96 percent of U.S. Catholic women had used contraceptives at some point in their lives and that 72 percent of Catholics believed that one should use birth control. According

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[35] Testimony of the Guttmacher Inst., *supra* note 32 (citing C. Goldin & L. Katz, *Career and Marriage Decisions*, 110 J. OF POLITICAL ECON. 730 (2002)), http://www.guttmacher.org/pubs/CPSW-testimony.pdf; Martha J. Bailey, *More Power to the Pill: The Impact of Contraceptive Freedom on Women's Life Cycle Labor Supply*, 121 Q. J. OF ECON. 289-320 (2006).

[36] Debbie Postlethwaite, *et al.*, *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 EDUCATION 360 (Nov. 2007).

[37] Guttmacher Statistic on Catholic Women's Contraceptive Use, GUTTMACHER INST. (Feb. 15, 2012), http://www.guttmacher.org/media/inthenews/2012/02/15/ (last visited Jan. 25, 2016).

to a nationwide poll of 2,242 U.S. adults surveyed online in September 2005 by Harris Interactive 90 percent of Catholics supported the use of birth control/contraceptives.[38]

The stated purpose of RFRA was to protect religious **individuals** and organizations. Therefore, to make allowance for religious organizations or the spokespersons for those organizations to exempt them from providing contraceptives to their employees as an exercise of religious freedom denies their employees as **individuals** the exercise of their religious freedom not to share their employer's religion in order to have access to contraceptives. Also, the individual rights of employees who share their employer's faith but nevertheless use contraceptives are victims of individual rights being subordinated to organization rights, a distortion of RFRA. For example, Belgian Cardinal emeritus Godfried Danneels believes that the Catholic Church should support condoms used to prevent serious diseases such as HIV because non-use is tantamount to murder.[39] Many Western Catholics have voiced significant disagreement with the Church's stance on contraception.[40]

August Bernhard Hasler quoted Pope John Paul II prior to his papacy stating that if it was declared that contraception is not evil, then the church would

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[38] Harris Interactive, *The Harris Poll #78*, (2005), http://www.theharrispoll.com.

[39] Marcella Alsan, *The Church & AIDS in Africa: Condoms & the Culture of Life*, 133 COMMONWEAL 8 (Apr. 21, 2006)

[40] A summary and restatement of the debate is available in Roderick Hindrery, *The Evolution of Freedom as Catholicity in Catholic Ethics*, *in* ANXIETY, GUILT, & FREEDOM (Benjamin Hubbard & Brad Starr eds., 1990).

have to concede that the Holy Spirit was on the side of the Protestant churches in 1930 (when the encyclical casti connubi was promulgated) in 1951 (Pius XII's address to the midwives) and in 1958 (the address delivered before the Society of Hematologists in the year the pope died). It would likewise have to be admitted that for a half century the Spirit failed to protect Pius XI, Pius XII, and a large part of the Catholic hierarchy from a very serious error. This would mean that the leaders of the Church, acting with extreme imprudence, had condemned thousands of innocent human acts, forbidding, under pain of eternal damnation, a practice that would now be sanctioned. [41] Consequently, since our courts can't question the truthfulness of religious beliefs,[42] it becomes easy for claimants to assert political or economic interests, such as religious market share, as an "exercise of religion."

The unique and enduring feature of democracy that distinguishes it from a monarchy, or theocracy is that democracy is an enterprise of the collective wisdom of its citizens engaged in the experiment of self-government. In order for democracy to fulfill its mission of citizen participation in governing, the ideas under consideration for serving the general

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[41] AUGUST HASLER, HOW THE POPE BECAME INFALLIBLE: PIUS IX AND THE POLITICS OF PERSUASION (1981).

[42] In *United States v. Ballard*, 322 U.S. 78 (1944), the Court held that it shouldn't decide what religious claim was true, but only whether the church members honestly believed them to be true. The courts should avoid excessive entanglement with religion to "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary." *Zorach v. Clausen*, 343 U.S. 306, 313-314 (1952).

welfare must be debatable and falsifiable from the experience, reason, and observation of the collective citizens. Religious faith is insulated from discourse and is infallible because its foundation is in whatever one believes to be the correct interpretation of God's word, *i.e.* the Old or New Testament, the Quran, the Pope, the Imam. Rational discourse that contradicts God's word is irrelevant to faith-based decisions.

Faith is a conversation stopper because the only way to disagree is to deny the authority of the religion claiming the authority to interpret God's laws. Consequently, our courts do not look to religious text as the authority for guidance in resolving disputes in civil litigation. It employs moral persuasion as embodied in the precedents that have their basis in human experience and that have endured or been revised over time to reflect new understandings of the human personality and our impact in society. It is a secular enterprise. Neither Sharia law nor the authority of the Pope are appropriate for influencing the outcome of legal disputes. Laws become established precedents by gaining public confidence or resonance in their perceived fairness. These applicable precedents have served over time to resolve conflicts in a context of several interdependent relevant precedents applicable to the unique facts at issue. On the other hand, religious law is selectively simple, one-size-fits-all, in its methodology. There is no room for compromise, or consideration of the interrelationship of competing human centered principles. For example, the punishment does not have to fit the crime. God kills all the Egyptian children or creates a flood to kill all but Noah as retribution for sin.

RFRA permits greater freedom of religion by shifting the burden of proof to the government to show that it has employed the least restrictive means of furthering a compelling government interest. However, there must be limits to what kind of religious behavior must be accommodated without any rational justification other than that it is based on faith. The court can't ignore the social consequences of these faith-based behaviors in the application of RFRA. Otherwise, the Bible, Sharia law, the Pope, or the Quran would supersede secular laws neutral to religion in service of the general welfare. Thus, there would be no basis for challenging the legitimacy of religious law that undermines the security, health, and safety of our nation.

What constitutes "least restrictive means" for furthering a compelling secular government interest must be limited when religious authority is used to obstruct the purpose of our Constitution set out in its preamble in service of the "general welfare."

Baptists accept the Bible as the inerrant word of God. They adhere to scripture as written and as interpreted through their belief system. According to scripture, the purpose for marriage is procreation. Baptists do not object to the use of contraception within a marriage. They are also opposed to the use of contraception outside of marriage because they do not condone premarital or extramarital sexual activity.

Therefore, in order to satisfy Baptists restrictions on the use of contraceptives it would be necessary to accommodate their faith by enabling them to police whether the recipients engaged in premarital or

extramarital sex. This would enable the employer to investigate the sexual practices of his employees in violation of their privacy rights.

Also, when religions engage in parsing unique circumstances for the application of their rules (such as condoms are permitted for reproduction, but not outside marriage), they become theocratic laws unto themselves. Religious pronouncements that God intended that every sex act should be for the purpose of procreation is a subject that has serious public implications that effects our welfare system, tax system, adoption policy, child protection system, women's equality, and the consequences of unlimited population. By insulating consideration of these factors as violations of religious freedom we transform our society into a theocracy.

In order for this Court to decide whether the signing of a form exempting employers from distributing contraceptives is a de minimis imposition on their freedom of religion, the judges must rely on their personal experience. There is no objective way of deciding whether signing a form is a material imposition on faith. Some judges may believe that even de minimis impositions on faith are impermissible. This will depend on the subjective opinion of the judge. However, this determination can be avoided by ruling that (1) a compelling government interest has been determined by Congress to be served by providing contraceptives as a preventive health component of ACA and (2) there are some religious behaviors (signing a waiver) that can't be accommodated by laws necessary to serve the public welfare, security, or health.

IV. The Original Meaning of the Declaration of Independence About the Relationship of Religious Freedom and Secular Laws

The Declaration of Independence sets forth eighteen grievances, the thirteenth of which has nine subparts.[43] These grievances describe King George as a tyrant by his deliberate imposition of the listed disparagements to the human dignity of the colonists. These grievances were a result of a King acting on the divine authority of God without accountability to the dignity of his subjects. Therefore, the colonists "constituted a government and established rights, so that the people would want to obey the laws."[44] A better and more just governance of society arose not by the grace of a transcendent authority, nor because of a movement directed by divine authority, but through a process of evolution that engages human collective understanding in service of their wellbeing. The introductory phrase of the Declaration of Independence – "when in the course of human events" – alerts us that the event to be announced does not arise from any divine intercourse. Thus, the story begins "when it becomes necessary for one people to dissolve the political bands which have connected them with another." The people recognized themselves to assume the powers of the earth to repudiate an imperial government because of grievances disparaging the human dignity of the colonists. As humans we have equal dignity from

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[43] DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY (2015).

[44] Lucretius, *De rerurn natura lateinisch and deutsch* (Weidmann 1924) 1:150.

which we have a common right to life, liberty and the pursuit of happiness. Thus it was necessary "to assume among the powers of the earth the separate and equal station to which they are entitled by the laws of Nature and of Nature's God."[45]

Until that time the common view supposed that we know God through miracles and signs; but philosophers Baruch Spinoza and John Locke (who most prominently influenced the Continental Congress) insisted that we know God because there are no miracles or signs that might disrupt the lawful chain of natural causes that leads from one thing to another. The common view supposed that God acts against the laws of nature to grant favors to some of its creatures because of adhering to the "right" religion; but Spinoza and Locke take for granted that God can only work through the laws of nature. This explanation of our entitlement is not for the benefit of gods nor priests, but appeals to the laws of nature. This was what they meant by "Nature's God."[46] It makes clear that the reasons for the revolution were experiences of this world that violated human dignity, not sins demanded of a disembodied spirit. The debates in the Federalist Papers were not about appealing to scripture or claims of God's authority, but to moral persuasion from experience about what makes for a just society.

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[45] MATTHEW STEWART, NATURE'S GOD: THE HERETICAL ORIGINS OF THE AMERICAN REPUBLIC 139 (2015).

[46] *Id.* at 87-94, 106-09, 114-17, 123-24, 129-31, 138-39, 149-50, 171-75, 209-10, 221-25, 244-48, 257-62, 273-80, 289-93, 315, 325-7, 331-34, 346-47, 353-57, 360-63, 367, 370-81, 394-5, 401, 406-28.

The preamble to our Constitution provides the foundation for establishing a nation by realizing the limitations of a collection of colonies. Thus, the purpose of forming a nation was to serve the general welfare. This was a recognition that we can become a more perfect union by participatory democracy. Therefore, we can both value the varied beliefs of many faiths and secure the health, safety, security and welfare of citizens. We need not sacrifice these compelling government interests in order to "respect" the free exercise of religion.

V The Original Meaning of the Constitution

In order to understand the original meaning of the Constitution it is necessary to understand the writings of the philosophes that informed the ideas of the authors at the Constitution and the Bill of Rights.[47]

According to Locke, our knowledge, moral ideas, and beliefs are bounded by experience, therefore our values, sense of the world, and beliefs are relative to time, place, and personal experience. One's beliefs are relative to the nature of the human senses.

Montesquieu was aware of absolutism and the arbitrary power of people who claimed authority by divine right. His protestant wife made him aware of differences as a result of the accident of birth. His

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[47] Professor Alan Charles Kors is a leading expert on the Enlightenment as the Editor in Chief of the four-volume Encyclopedia of the Enlightenment with several co-editors who are professors of history at leading universities. ENCYCLOPEDIA OF THE ENLIGHTENMENT (Alan Charles Kors, ed., 2002). This section is taken from chapters 16-21 and 23-24 of Professor Kors' book, BIRTH OF THE MODERN MIND: THE INTELLECTUAL HISTORY OF THE 17TH AND 18TH CENTURIES (1998).

book *Persian Letters* was an extraordinary literary success. It was an epistolary novel in which Persian travelers see the West through Persian eyes. He depicts humans living and believing in a variety of ways, but there were natural consequences setting limits on our malleability. He makes light of ethnocentrism and distinguishes between what is malleable and what is common to all human experience. An independent natural reality exists in which behaviors have consequences pointing to universal values. There are objective conditions of justice and survival that we ignore at our peril.

Voltaire's *Letters Philosophiques* popularized the works of Locke and Isaac Newton. His book was an assault on orthodox, absolute, and aristocratic France. In his letters he introduced his readers to criticisms of the Catholic Church and to a free-thinking discussion of religion. He treats religion as a phenomenon that can be studied in natural terms. Civil strife, fanaticism, and persecution are limited by means of religious tolerance. Thus, it was religious tolerance that inspired the authors of our constitution to respect religious freedom. Voltaire expresses the philosophy of enlightenment as reason and experience moving us from helplessness to increased happiness. All things should be judged by their effect upon human well-being.

Christian theology distinguished between *beatitude* (blessed reunion with god in life everlasting) and *Felicitas* (earthly happiness). Christian moral theologians taught that the latter was a fallen, corrupted remnant of the highest calling to pursue beatitude. Therefore, it was necessary to disparage sex as a source of pleasure in

this life, rather than as an instrument for reproduction. The pursuit of pleasure was a mark of our original sin and distance from God.

Increasingly, 17th century thinkers saw the ordered laws of nature as the instruments of God's will and purpose. Following the empirically discernible laws of nature meant following the laws of God. The laws of nature validated the desire for pleasure and avoidance of pain in this life. As God created humans in his image, we were endowed with an attraction to pleasure and love in this life. The desire for happiness was what God chose for us. Humans employ reason as a distinguishing trait to understand and interact with the world.

Bishop Joseph Butler used this model of human "nature" in his *Fifteen Sermons on Humane Nature* to argue that before and independent of Christian revelation our tendencies of our nature lead us to virtue. To understand our essence, the pursuit of happiness, governed by reason and conscience, is to know our nature. Self-love is good and is consistent with benevolence. We must love ourselves if we are to love our neighbors as ourselves. To say that we should not seek happiness in this natural world was to criticize the design of God. Similarly, for the deist, Mathew Tindal, happiness was the pursuit of knowledge, bodily health, and physical pleasures which were intended by God.

Thus it was a natural step from Bishop Butler to Thomas Jefferson, who asserted that it was self evident that all human beings were endowed by their Creator with the unalienable right to the pursuit of happiness. By making this declaration

Jefferson was affirming 18th century Christian natural theology.

In the 18th century Philosophes of the French Enlightenment were committed to a meritocratic "Republic of Letters." Empirical knowledge would be applied to the reduction of human suffering and the increasing of human well-being. They rejected inherited authority and authority by divine right. They were committed to rational analysis, empirical evidence, and that nature was the sole source of knowledge and values. They shared the ethical principle of utility, the view that happiness of the species is the highest value, and that morality may be judged by their contribution either to happiness or suffering.

Enlightenment thinkers were in fundamental conflict with the Roman Catholic Church in France. Most were deists and held that God spoke to mankind through nature alone, and that priests were false prophets of God's voice.

A major agency of the dissemination of the Enlightenment was the project of the *Encyclopedie*. Knowledge was a human power to understand all natural things and to alter what could be altered. It embodied the need to question the origins and foundations of authority, beliefs and institutions. It embodied the methodical use of the human mind in intellectual progress. It celebrated secular inquiry.

Its existence as well as its contents undermined the sacred idols and established intellectual authorities of its culture and established a consciousness of reason. Enlightenment thinkers claimed that much of existing authority is arbitrary,

arising from power and tradition alone. They called upon authority in countless domains to justify itself according to natural experience. Enlightenment thinkers rejected supernaturalism; our knowledge is bounded by natural experience.

Happiness is the ultimate ethical criteria which engenders debates between individual and societal happiness; physical versus psychological happiness; and whether there is happiness in virtue. The Church was placed on the defensive. The most successful issue of the enlightenment was toleration, which enabled competing religions and secularists to live together peacefully. This won over public opinion and the state.

French philosopher Jean-Jacques Rousseau's contribution to the evolution of Enlightenment thought includes his thoughts that what we know of God, we know from nature and reason which are universally available. Christianity confuses the ceremony of religion with the interior adoration of God. Individuals are Christian, Muslim, Jew, or Buddhist by the accident of birth and education. All religions claim extraordinary means to prove themselves (miracles, prophecies, grace, unique forms of baptism, self-identified as "chosen people"). It would take a lifetime of scholarship and knowledge of all dead and living languages to evaluate such claims. Rousseau asked: "Is that how God would reveal Himself?" Rousseau concludes that we should know God through nature and work for the truth.

Arbitrary power creates and maintains social injustices that we regard as natural, but are a creation of culture. It stifles conscience and natural

compassion and breeds selfishness. Rousseau's *Emile* argues that the understanding of the nature and basis of government can produce moral citizens.

The naturalization of the 18th century scientific world view left spiritualistic explanations of physical behavior increasingly seen as an admission of ignorance. The soul, equated with mind, is not distinct from the body Nature has formed us as organisms capable of thought.[48] Human thought is a scientific, not a theological, mystery.[49]

In conclusion, the words of the First Amendment phrase pertaining to religion, *i.e.* "prohibiting the free exercise thereof" was viewed as a useful way of insuring religious tolerance among competing religions with different supernatural beliefs. It was not intended to enable the most powerful and largest religions to impose their dogmas on others at the expense of the general welfare.

VI. The Position of Humanism Toward Contraceptives

Humanists share a commitment to a belief that moral values are discoverable by examining the human impact of behaviors without reference to an invisible spirit. We can achieve a better life for ourselves and our community by employing reason, empathy, emotional intelligence, and honesty in order to live a life of good character in service to a better community, a better world.

Humanists, by considering only human factors, uniformly favor the use of contraceptives.

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[48] JULIEN OFFRAY DE LA METTRIE, LA METTRIE: MACHINE MAN AND OTHER WRITINGS (Ann Thomson ed. 1996).

[49] DENIS DIDEROT, D'ALEMBERT'S DREAM (1769).

Humanists' commitment to the use of birth control is as firm as the religious conservatives' faith in the sinfulness of contraceptives. The humanists' moral position is based on secular considerations of health (prevention of contagious disease), the prevention of unwanted pregnancies, the prevention of overpopulation, and the prevention of childbearing for women who don't love and can't care for their children.

If the claimants in this suit are successful in their rejection of the waiver to prevent the distribution of contraceptives, then they will be denying humanists their sincerely held acts of conscience. This Court has ruled that First Amendment religious freedom claims apply equally to organizations that do not subscribe to God centered morality. *See Torcaso v. Watkins*, 367 U.S. 488 (1961) and *United States v. Seeger*, 380 U.S. 163 (1965).

Secularism, unlike atheism (a belief that God doesn't exist), is a belief that claims of authority based on the moral authority of God are not appropriate sources of persuasion regarding public policy.

Bruce Sabalaskey in his article on *The Role and Freedom of Conscience* mischaracterizes the Secular Humanist View of Conscience as "anything goes as long as the 'conscience is clear.'"[50] This is a common Catholic critique demonizing Humanists as having no guidelines of moral character and integrity. Contrary to Sabalaskey's assertion, Humanist values of personal integrity and good character are internal

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[50] Bruce Sabalasky, *The Role and Freedom of Conscience* (2000), http://www.ourladyswarriors.org/articles/conscience.htm (last visited Jan. 25, 2016).

and constrained by love of self, family, and community. It is a product of healthy parenting and life experience, rather than dictates of God according to Humanists. Humanists are substantially underrepresented in prisons.[51]

Humanists hold dear the values of trust, honesty, kindness, generosity, and fairness, as do religious people. According to their beliefs, their values do not depend on whether or not there is a hell or whether someone died for our sins. Conscience is the power of perception for what is laudable. The aspiration for humans is to seek a better world, a more peaceful world, a kinder and more fulfilling life. According to Humanists these goals can be achieved without claims that any religion uniquely is God's agent on earth to define morality for other religions.

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[51] Data from the Federal Bureau of Prisons dated April 27, 2013 indicates that .07% of prisoners identify as atheists, 17% identify as having no religious affiliation, 28.7% identify as Protestants, 24% identify as Catholics. Atheists in the general population are 1.6% or 7% according to different polls, which is 10 to 20 times their representation in prisons. Catholic prisoners are on par with their representation in the general population, *i.e.* 24%.

CONCLUSION

In conclusion, Humanists believe that First Amendment freedom of religion should be honored as an individual's personal right of conscience. However, *behaviors* based on religious beliefs should be subordinated to laws that serve a compelling government interest serving the general welfare. Consequently, the *Smith* case would not have been decided the same way according to these criteria. 494 U.S. 872 (1990). The defendant's use of peyote restricted to a religious ceremony had no substantial bearing on other citizens of the state and no demonstrable harm to the defendants. Therefore, RFRA is unconstitutional insofar if it shifts the burden of proof to the government to accommodate any religious belief without regard to the health, security or general welfare. This interpretation of the constitution subordinates the body of the constitution to the preamble, the purpose of the constitution.

Respectfully submitted,

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